

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
CABLE DIVISION**

Petition Of Verizon New England Inc. For
Amendment Of The Cable Division's Form
500 "Cable Operator's Annual Report of
Consumer Complaints"

DTC 08-12

**MOTION TO INTERVENE
AND
COMMENTS OF THE CITY OF BOSTON**

I. INTRODUCTION

The City of Boston ("City") moves to intervene and files these comments¹ in opposition to the Petition² of Verizon of New England ("Verizon"). The City believes the Massachusetts Department of Telecommunications and Cable ("Department") in establishing Form 500 requirements, including the duty to report subscribership data by municipality, acted consistent with Massachusetts law and in the public interest.³ The City further believes that Verizon underestimates the value of the Department's reporting rules, and overstates both the rules' competitive harms and the benefits of its own competitive entry. Therefore, the Department

¹ Request for Comment & Notice of Public Hearing In the Matter of Petition by Verizon New England Inc. for Amendment of the Cable Division's Form 500 Cable Operators Annual Report of Consumer Complaints, DTC 08-12 (March 27, 2009).

² Petition of Verizon New England Inc. for Amendment of the Cable Division's Form 500 "Cable Operator's Annual Report of Consumer Complaints" (August 22, 2008).

³ The mission of the Department is clear from its webpage: "Our mission is to support competition in telecommunications and cable services in Massachusetts and to protect the public

should deny Verizon's petition, and preserve this important consumer protection measure, assured that should Verizon challenge the Department's rules, the Commonwealth courts would defer to the Department and uphold its rules.⁴

II. MOTION TO INTERVENE

The City petitions for leave to intervene in this proceeding. In support of this motion, the City asserts that in its role as the Issuing Authority, the City oversees and licenses cable television operators within Boston. If the Department grants Verizon's petition, the City could no longer rely upon Form 500 for annual local subscriber count and complaint data. Without this Boston-specific, operator-specific subscriber information, the City could not fairly evaluate how each licensee performs and complies under the consumer protection clauses in current cable licenses. In addition, the City could no longer observe and remedy trends in consumer complaints. Thus, the City is substantially and directly affected by this proceeding, and qualifies for Intervenor status under 220 C.M.R. § 1.03.

The City also associates itself with the comments of the Town of Andover *et al.* in urging the Department to find that the City and other interested parties should not be required to intervene in this matter as a threshold requirement to comment. Andover writes "[T]he public interest is disserved by denying interested persons the use of the informal notice and comment rulemaking process and replacing it with a more formal adjudicatory process, a process with

interest by ensuring that customers of these services are treated consistently with our regulations."

⁴ *Order Adopting Revised Form 500*, Dept. of Telecom. & Energy (June 11, 1999). Available on line at <http://www.mass.gov/Eoca/docs/dte/catv/500adopt.pdf>

more onerous rules of participation. Use of adjudication in lieu of rulemaking is a bad precedent.”⁵ Boston agrees.

III. THE DEPARTMENT HAS AUTHORITY TO REQUIRE CABLE OPERATORS TO REPORT SUBSCRIBERS BY MUNICIPALITY.

A. The Department Has Directly Delegated Authority To Act.

There can be no question that with respect to cable, the Legislature has granted broad agency authority to the Department⁶ including the ability to require cable operators to report subscribership data by municipality. Massachusetts law broadly empowers the Department to “issue such standards and regulations as it deems appropriate to carry out the purpose of this chapter.” Mass. Gen. Laws ch. 166A § 16. Further, the Legislature expressly empowered the Department to “prescribe” the form under Section 10. Mass. Gen. Laws ch. 166A § 10. The Supreme Judicial Court has recognized that the Department has broad powers to regulate in the field of cable television. *Grocery M frs. of Am., Inc. v. Dep’t of Pub Health*, 379 Mass. 70, 75 (1979) (citing *Warner Cable of Mass. Inc v. Community Antenna Television Comm’n*, 372 Mass. 495 (1977)); Mass. Gen. Laws ch. 166A, § 2.

B. The Department’s Actions Are Entitled to Deference on Appeal.

Because the Legislature has delegated this broad authority to the Department, were Verizon to challenge the Department’s Form 500 requirements, the Department’s rules would be entitled to considerable deference under Massachusetts’ principles of judicial review of administrative actions:

⁵. See Motion To Intervene and Comments of Town of Andover at 3-4

⁶ Pursuant to Governor Patrick’s Reorganization Plan, Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy ceased to exist, effective April 11, 2007. The

- A court must give an agency regulation the same deference it would extend to a statute, and may not substitute its judgment for that of the administrative agency absent a showing that the regulation in question is not consistent with the power delegated. *Town of Holden v. Wachusett Reg'l Sch. Dist. Comm.*, 445 Mass. 656, 664 (2005); *Borden Inc. v. Commissioner of Public Health*, 388 Mass. 707, 723 (1983).
- So long as a regulation is consistent with the “scheme” or “design” of a chapter of the General Laws, the regulation need not be traced to a specific section of the statute. *Cambridge Electric Light Co. v. Dept. of Public Utils.*, 363 Mass. 474, 494 (1973).
- A party must prove that the regulation is illegal, arbitrary or capricious. *Borden Inc. v. Comm'r of Health*, 388 Mass. 707, 722 (1983).; and
- The plaintiff, not the Department carries “the heavy burden of proving . . . the absence of any conceivable ground on which [the rule] may be upheld.” *Collella v. State Racing Comm'n*, 360 Mass 152, 156 (1971). *See also Am. Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 478 (1983); *Purity Supreme Inc. v. Attorney General*, 380 Mass. 762,776 (1980).

C. Massachusetts Courts Have Endorsed the Department’s Authority.

Massachusetts courts have previously recognized broad administrative authority in similar settings. In 1984, the Department’s predecessor agency, the Community Antenna Television Commission, faced a similar challenge when the cable industry claimed that the authority delegated to the Commission “to carry out the purposes of [Chapter 166A]” provided

Department of Telecommunications and Cable has assumed the duties and powers previously exercised by the Cable Division under General Laws, Chapter 166A.

no authority to impose security deposit regulations. Justice Mel L. Greenberg of the Superior Court concluded the under the judicial review standards of the Commonwealth and the “broad grant of authority to the Commission in Chapter 166A to regulate in the field of cable television,” it would not be appropriate to limit the Commission’s ability to require security deposit regulations. *New England Cable Television Association, Inc. v. Community Antenna Television Commission*, Superior Court Civil Action No. 70134 (Dec. 3, 1984).

IV. THE DUTY TO REPORT SUBSCRIBERSHIP DATA FURTHERS THE PURPOSE OF MASSACHUSETTS LAW AND IS IN THE PUBLIC INTEREST.

The Department has properly exercised its delegated authority by requiring a cable operator to collect and disclose subscriber counts by municipality. Because this requirement furthers the purposes of the statute and serves the public interest, the Department should not alter the requirement.

Verizon argues that the benefits of reporting the number of subscribers by municipality are *de minimis*. (Petition at 2.) The City of Boston disagrees. The Department has recognized that “for the Form 500 to be useful, the size of the ‘data set,’ i.e., the total number of subscribers, needs to be publicly available.” Department of Telecommunications and Cable, Ruling on Motions for Confidential Treatment filed by Verizon New England, Inc., June 7, 2007 (“Denial Order”) at 10. This is eminently reasonable. By itself, the number of subscriber complaints reveals very little about a cable system’s operations. For example, in a system that serves 10,000 subscribers, 50 complaints may reflect a minor problem. But in a system that serves 100, it could reflect a major failure. Thus, by requiring the cable operator to provide the denominator in this ratio, the Department’s Form 500 requirement provides important context. The requirement reasonably advances the Legislature’s intent under Section 10. Federal customer service

regulations follow a similar approach. 47 C.F.R. § 76.309(a)(2) (requiring telephone answering standards to be met “no less than ninety five (95) percent of the time”).

The subscriber numbers serve other important purposes under Massachusetts law. Under the preceding section, Mass. Gen. Laws ch.166A, § 9, a cable provider must remit an annual license fee of \$0.80 per subscriber to the Commonwealth and \$0.50 per subscriber to each municipality in which it serves.⁷ Because this fee is measured *per subscriber*, a municipality cannot be assured of full payment without a subscribership count. Municipalities also need such information to assess whether a cable operator has accurately paid franchise fees and PEG support, and complied with line extension and build-out obligations.

The City would further associate itself with the additional policy reasons for the existence of Form 500 obligations as articulated by the Town of Andover. *See* Motion To Intervene and Comments of Town of Andover at 5-7.

V. VERIZON OVERSTATES THE COMPETITIVE HARMS OF THE REQUIREMENT AND ITS OWN COMPETITIVE ENTRY.

To justify its request, Verizon overstates the harms arising out of the Form 500 requirement, and makes too much of its own competitive market entry.

The duty to provide subscribership data does not pose a significant competitive problem. As the Department noted in its Denial Order, Verizon cannot sneak up on the competition. Incumbents know when Verizon has obtained a franchise. Even if the documents were not

⁷ Denial Order at 8. The Department further explained the frustration of the Verizon’s end goal in that the subscribers per municipality “is easily available to the public at the municipal level . . . (and therefore) . . . there is no need for the Department to protect the information from public disclosure filed with us.” *Id.* at 9.

public records, Verizon issues press releases and obtains advertisement placements regarding Verizon's offerings.⁸

Verizon also makes too much of its entry into the cable market in Massachusetts. The City welcomes the choice that Verizon is offering some consumers within the Commonwealth⁹ and around the county. However, Verizon is currently offering no such choice to the citizens of Boston. The City agrees with Verizon that competition should benefit consumers with "service discounts and promotions, [as well as increase]... innovation and [the] quality of service ... [while] expanding programming options." (Petition at 3.)¹⁰ Boston looks forward to the day that its consumers will have the choices and benefits that a fully competitive market may bring.¹¹ But, at this time, the cable market is anything but competitive. Thus, the City urges the

⁸ Todd Spangler, Verizon Nets Another 299,000 FiOS TV Customers; Telco Posts Record FiOS Internet Additions, As Landlines Keep Dropping By -- Multichannel News, 4/26/2009 11:27:00 AM MT available on line at <http://www.multichannel.com/article/210036-Verizon-Nets-Another-299-000-FiOS-TV-Customers.php?nid=2226&source=title&rid=5883628>

⁹ Verizon indicates that is providing service to 75 cities and towns in Massachusetts. (Petition at 3.) The City is troubled that Verizon has chosen not to bring service to the largest city in the Commonwealth and its capital. The City believes that the Department should be similarly troubled by what could appear to some to be retribution for the City's defense of its right to uniformly apply tax laws to all entities including Verizon.

¹⁰ Verizon does not support its claim that its market entry is leading to these benefits. Verizon cites the FCC's Cable Franchise Order, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007),¹⁰ but the paragraph it cites does not address the issue of benefits at all, let alone the benefits Verizon claims to be providing in the Commonwealth. Research conducted by the National Association of Telecommunications Officers and Advisors reveals that consumers are not seeing long term savings, and that it is premature to sacrifice any tool that may be available to local government.

¹¹ The City publicly invites the company to seek a franchise to provide cable services in Boston rather than the company's current plan of seeking legislative or regulatory relief from the state.

Department not to abandon the important consumer protection measures within Form 500 based on Verizon's claims about competitive entry in Massachusetts.

V. CONCLUSION

For the reasons indicated above, the Department should affirm its Denial Order and deny the instant petition. Furthermore, the Department should certify the City of Boston as a party to this matter and afford the City the opportunity to provide testimony if need be at any subsequent hearings.

Respectfully submitted on behalf of the
Issuing Authority, Mayor Thomas M. Menino



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